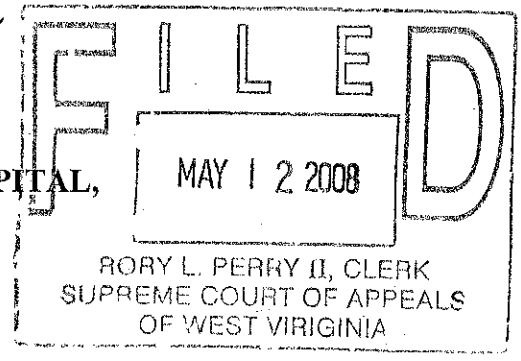
In the Supreme Court of Appeals of West Virginia

No. 33682



DAVIS MEMORIAL HOSPITAL,

Appellant,

v.

WEST VIRGINIA STATE TAX COMMISSIONER,

Appellee.

Honorable John L. Henning
Circuit Court of Randolph County
Civil Action No. 07-C-9

REPLY OF THE APPELLANT

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TABLE OF AUTHORITIES

Cases

Statutes

For the reasons discussed in its brief and herein, Appellant Davis Memorial Hospital ("the Hospital") respectfully requests the Court to reverse the Circuit Court of Randolph County and to order that Appellee West Virginia State Tax Commissioner ("Commissioner") grant the Hospital's petition for refund.

I. ANALYSIS

A. Analysis of this case, which involves a question of statutory construction, is governed by the rules of grammatical and statutory construction, not what the "man on the street" thinks.

Throughout his brief, the Commissioner—like the Office of Tax Appeals ("OTA") before him—maintains that courts are bound to interpret statutes not by applying the rules of English grammar (which the Commissioner says are instead reserved for interpreting "sentences," not statutes)[1] and not by reference to established canons of statutory construction. Instead, argues the Commissioner, courts should ask "the typical man on the street" for assistance interpreting technical commercial taxation statutes and regulations.[2]

This argument for ignoring grammatical rules when construing statutes, however, is without merit. In addition to the cases already cited by the Hospital, the Court has repeatedly relied on rules of grammatical and statutory construction, rather than polling random people on the street, as the Commissioner would have it do.[3]

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[1] *See* Appellee's Br. at 6 (calling application of the rules of grammar "interesting" but "not very helpful").

[2] *See id.* at 5-6 & 15.

[3] *See, e.g.*, *State v. Green*, 207 W. Va. 530, 537, 534 S.E.2d 395, 402 (2000). Ironically, the one issue in this case that *would* suitably be governed by the meaning ascribed to a phrase by the "typical man on the street" flatly contradicts the Commissioner's position. The Commissioner earlier argued that "fundraiser" includes anything that "raises funds" (like charging patients for services rendered). That argument lacks any merit, and the Hospital assumes that the Commissioner has abandoned it here.

The Court recently reaffirmed the principle that only "[w]here a statu[t]e *does not specifically define* words of common usage [should] a dictionary . . . be consulted . . . ." *Parker v. Estate of Bealer*, 221 W. Va. 684, 656 S.E.2d 129, 133-34 (2007) (emphasis added) (citation omitted) (second alteration in *Parker*). Here, it is beyond dispute that the Legislature *did* give "support" a technical meaning. The fact that this legislatively-provided definition might differ from what the "man on the street" thinks is, therefore, legally irrelevant.

B. The OTA's decision is subject to *de novo* review and entitled to no deference—both under the applicable legal standard and also because it is quite clearly erroneous.

The Commissioner asserts throughout his brief that the "OTA decision discussed the exemption at great length"[4] and relies on that decision (and the circuit court's) for support of much of his argument. This is, of course, absolutely wrong. As the Commissioner appears to accept, the standard of review is *de novo*.[5] Furthermore, as noted in the Hospital's brief, the OTA's lengthy discussion in its decision was certainly of *an* exemption, but not one that appears ***anywhere in West Virginia law***. Instead, the OTA's decision was based on one that the OTA had to pull out of thin air by materially *misquoting* and *altering* West Virginia state law not once but *three separate times* in order to shore up the Commissioner's position.

It is well-settled, however, that courts and agencies are bound to apply the *real* law—the law that the Legislature actually wrote. Neither is free to simply make up the law when the enacted language does not suit its purpose.[6] As demonstrated, the law that the Legislature actually wrote, in this case, supports the Hospital's, not the Commissioner's, position.

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[4] Appellee's Br. at 8.

[5] *See id* at 2.

[6] *See* Syl. pt. 4, *Corliss v. Jefferson County Bd. of Zoning Appeals*, 214 W. Va. 535, 591 S.E.2d 93 (2003) (" 'While the interpretation of a statute by the agency charged with its

C. The Commissioner's argument that the Court should ignore the modified adopted construction doctrine is wrong.

The Commissioner offers several reasons why the modified adopted construction doctrine, which he concedes is "generally applicable in West Virginia"[7] nevertheless does not apply to this case. None of these reasons, however, has any merit.

1. The modified adopted construction doctrine applies to statutes adopted—but modified—from other jurisdictions.

The Commissioner takes the somewhat curious position that while the Legislature might understand its *own* laws (and so when it modifies its own law, the modified adopted construction doctrine applies), the Legislature is, alas, too incompetent to understand *federal* law, and so the modified adopted construction doctrine does not apply to circumstances where the Legislature adopts with modification a federal statute.[8]

The Commissioner has offered no rationale for or cases in support of this argument,[9] while several of the cases that the Hospital cited earlier involved just such "cross-jurisdictional"

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administration should ordinarily be afforded deference, when that interpretation is unduly restrictive and in conflict with the legislative intent, the agency's interpretation is inapplicable.' ") (citation omitted) (quoting syl. pt. 5, *Hodge v. Ginsberg*, 172 W. Va. 17, 303 S.E.2d 245 (1983); Syl. pt. 1, *Consumer Advocate Div. v. PSC*, 182 W. Va. 152, 386 S.E.2d 650 (1989) (holding that "[a] statute, or an administrative rule, may not, under the guise of 'interpretation,' be modified, revised, amended or rewritten").

[7] Appellee's Br. at 14.

[8] *See, e.g.*, Appellee's Br. at 14-15. The Commissioner's position is curious because just two pages later, he sites *Rose* for the proposition that "when a legislative enactment is based upon a statute *from another jurisdiction*, the logical conclusion is that the Legislature intended to adopt the statutory language and its previous interpretations." (Appellee's Br. at 17 (emphasis added).) Apparently, then, the Legislature understands another jurisdiction's law when it adopts it *unmodified*, but when the Legislature adopts but *modifies* another jurisdiction's law, we should presume that it did not understand what it was doing.

[9] The Commissioner's assertion that the Hospital has not "cited any state or federal case law to support its primary argument under the 'modified adopted construction doctrine' [that] the addition of the phrase 'from fund raisers which include receipts' to the Internal Revenue Code" was intended to change the meaning of the test (Appellee's Br. at 21) is, at best, disingenuous.

application of the modified adopted construction doctrine.[10] The Commissioner's attempt to distinguish these cases is as unsupported by the law as it is insulting to the Legislature, and the Court should reject the argument out of hand.[11]

2. Because the state support test was both adopted *but* modified from the federal support test, the modified adopted construction doctrine applies.

The Commissioner next asserts that the modified adopted construction doctrine does not apply because the state statute was not "modified" from federal law. The Court may, of course, quickly reject this argument, because even a cursory comparison of the federal and statute support tests demonstrates that the assertion is wholly unfounded.

The Hospital certainly has cited a wealth of cases that stand for the very same general proposition. And the reason why no case was cited standing for the proposition that the very language involved was intended to change the meaning of the test is obvious: no other Legislature has ever made such a change, and this Court has never decided the issue, or this case would have been over before it started.

[10] *See also Gallegos v. State*, 163 P.3d 456, 459 (Nev. 2007) ("[W]hen a Nevada statute is modeled after a federal statute, '[i]t must be presumed that the exclusion of [a] provision in the Nevada statute [is] deliberate and [is] intended to provide a different result from that achieved under the federal . . . statute.' ") (quoting *Lane v. Allstate Ins. Co.*, 969 P.2d 938, 940 (Nev. 1998) (all but first alteration in *Gallegos*)).

[11] As recently as last June, the Court held that when deciding whether—or not—to follow a legislatively-imposed mandate to adopt the judicially determined meaning of a federal statute from which a state statute was originally adopted, West Virginia courts should look to, *inter alia*, the "similarity of language between the federal and West Virginia enactments" and "the competing or similar interests the federal and state enactments were designed to protect." Syl. pt. 7, *Kessel v. Monongalia County Gen. Hosp. Co.*, 220 W. Va. 602, 648 S.E.2d 366 (2007). Here, there is one noticeable ***dis***similarity between the federal and state support tests, a dissimilarity that the Commissioner hopes the Court ignores. And, as the Hospital demonstrated at length in its initial brief, the Legislature obviously designed the state support tests to protect an interest that the federal provision was not meant to protect. Thus, even had there been a legislative mandate here to follow federal law generally in applying state tax provisions, *Kessel* would still require departing from that mandate in the instant case.

First, it is obvious that the state support test was—with one modification—adopted directly from the federal test. Thus, it is clear that *some variant* of the adopted construction doctrine does apply.

Second, however, it is just as obvious that the state support test is *not* identical to its federal counterpart.[12] Indeed, it is the Commissioner, not the Hospital, who is arguing that the Court should ignore an "elephant standing in the middle of room" by ignoring the fact that the Legislature inserted restricting language into the support test before enacting it into state law.

In this endeavor, the Commissioner misapplies *Rose v. Pub. Serv. Comm'n*, 75 W. Va. 1, 83 S.E. 85 (1914). *Rose* requires that when "a statute *has been adopted* from another state or country, the courts usually follow the construction which it had received by the courts of the state or country from which it was taken." Syl. pt. 2, *id.* (emphasis added).

But *Rose* does not apply here because the state support test was not simply adopted from federal law. It was first *modified*, and only then enacted into state law. The Commissioner attempts to persuade the Court to ignore the modification by calling it a mere "minor discrepanc[y]."[13] But as the Hospital demonstrated in its brief, the "fundraisers" language is no "minor change,"[14] and it has been the law of this State since its inception that no court—or agency—is free to treat any part of a statute as if it had never been written:

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[12] The Commissioner attempts on page 10 of his brief to quote the Hospital out of context. The Hospital points out that while it has accepted all along that the Legislature adopted the state support test by using the federal test as a starting point—and thus *some variant* of the adopted construction doctrine is applicable—this is not the whole story, and the Hospital has just as steadfastly maintained at every level that the two statutes are plainly *not* the same—the position that the *Commissioner*, not the Hospital, takes.

[13] Appellee's Br. at 18.

[14] *Id.* at 15.

> A statute ought to be construed as a whole, and each section should be so construed that, if possible, no clause, sentence, or word should be superfluous, void, or insignificant; and where a general intention is expressed, and the act also expresses a particular intention, incompatible with the general intention, the particular intention will be regarded as an exception, and will prevail.[15]

Here, regardless of what the Commissioner sees as the "general intention" of the "not unrelated business activities" language, he cannot avoid the "particular intention" of the "fundraisers" language by pretending like the Legislature never inserted it. Thus, the *modified* adopted construction doctrine, not the adopted construction doctrine, applies here.

Undoubtedly, where there has been no "adoption," then there can be no application of any adopted construction doctrine. And, where there has been no "modification," then there is no application of the modified adopted construction doctrine. But where, as here, there has been both an adoption and a modification, the doctrine has its strongest and most obvious application, requiring the conclusion that the West Virginia support test does *not* mean exactly the same thing as its federal counterpart.

D. The phrase "includes but is not limited to" in West Virginia's support test cannot rescue the Commissioner's position.

The Hospital has already demonstrated why the phrase "includes but is not limited to" cannot rescue the Commissioner's position: It is akin to arguing that in the definition "X includes: A, B that is not Y, and C," X somehow still includes Y because of the "includes but is not limited to" language.[16] Here, income that is *not* a fundraiser has been excluded from one of the express elements of support. It therefore flies in the face of rationality to argue that "includes

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[15] Syl. pt. 3, *Jackson v. Kittle*, 34 W. Va. 207, 12 S.E. 484 (1890).

[16] *Compare* Appellee's Br. at 12.

but is not limited" language nevertheless sweeps back into a thing that which one of the express elements has plainly swept out.

E. *Andy Brothers* governs analysis of this case.

The Commissioner argues that *Andy Bros. Tire Co. v. W. Va. State Tax Comm'r*, 160 W. Va. 144, 233 S.E.2d 134 (1977), is inapposite because that case dealt with the B&O tax, whereas the instant one deals with the sales and use taxes.[17] This is a distinction without a difference.

It is well-settled that tax statutes are, generally, construed in favor of taxpayers, but that exemptions are, generally, construed in favor of taxation:

> In contrast to instances where we are called upon to interpret statutes that affirmatively impose a tax, here we are dealing with a statute that purports to limit an otherwise generally applicable tax law. As to the former circumstance, this Court has consistently signaled its willingness to construe any ambiguity in favor of the taxpayer. In cases involving the latter situation, however, we have indicated that "[w]here a person claims an exemption from a law imposing a license or tax, such law is strictly construed against the person claiming the exemption." Thus, *to the extent there is any ambiguity* in the exemption . . . , the statute must be given a narrow construction favoring taxation.[18]

But there is yet a further "exception to the exception": Where the statute at issue—one involving taxation or otherwise—has a socioeconomic purpose, the Court will "liberally construe [such] legislation" in order to effectuate that socioeconomic purpose.[19]

The Hospital's point is a narrow one. The Hospital does not, as the Commissioner suggests, argue that the entire scheme of sales and use tax has some grand socioeconomic

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[17] *See* Appellee's Br. at 21-22.

[18] *CB&T Operations Co., Inc. v. Tax Comm'r of State*, 211 W. Va. 198, 207, 564 S.E.2d 408, 417 (2002) (emphasis added) (citations and internal quotations omitted).

[19] 160 W. Va. at 147, 233 S.E.2d at 136.

purpose.[20] But rules enacted for a charitable purpose (like charitable deductions and exemptions) *do*, and it is equally widely recognized, therefore, that such rules constitute an exception to the exception, requiring liberal construction to effectuate their purpose:

> The general canon of construction is that statutes imposing a tax are interpreted liberally (in favor of the taxpayer). But provisions granting a deduction or exemption are matters of legislative "grace" and are construed strictly (in favor of the government). A special rule applies to charitable deductions, however, because these provisions are an expression of "public policy" rather than legislative grace. Provisions regarding charitable deductions should therefore be liberally construed in favor of the taxpayer.[21]

Here, the entire support test applies only to charitable organizations. In situations far less socioeconomically important than this one, courts have applied *Andy Bros.*, and this Court has approved.[22] Appellant can hardly imagine a socioeconomic purpose more closely aligned with the one that animated the Court's decision in *Andy Bros.* (attracting and retaining businesses important to the community) than relieving some of the financial burden on non-profit community hospitals.

The Hospital does not believe that it needs to rely on *Andy Bros.*, which only applies where the applicable legal test is ambiguous and in need of judicial interpretation. But if, in the minds of the Court, the case is otherwise too close to call, *Andy Bros.* requires the interpretation

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[20] *See* Appellee's Br. at 22.

[21] *Weingarden v. C.I.R.*, 825 F.2d 1027, 1029 (6th Cir. 1987); *In re Rayvid's Will*, 88 Misc. 2d 372, 374, 388 N.Y.S.2d 211, 213 (1976)("And federal tax law disfavors denial of charitable deductions on technical grounds ([*Lederer v. Stockton*, 260 U.S. 3, 8 (1922)]). Tax laws which are purposed to create incentives for charitable giving, may not be narrowly construed since they are 'liberalizations of the law in the taxpayer's favor . . . begotten from motives of public policy' ([*Helvering v. Bliss*, 293 U.S. 144, 151 (1934)]).").

[22] *See, e.g., Davis Memorial Hospital v. Helton*, No. 062199 (W. Va. January 9, 2007).

that best effectuates the Legislature's intent to relieve the burden on non-profit organizations like the Hospital,[23] as more thoroughly demonstrated in the Hospital's brief.

II. CONCLUSION

Perhaps the Commissioner's own brief best sums up the reason to reject his position:

> If the West Virginia Legislature had wanted to restrict the support test to fundraising activities only . . . , the Legislature would not have adopted the Internal Revenue Code language as it did.[24]

But what the Commissioner has steadfastly refused to accept is that the Legislature did ***not*** simply adopt the Internal Revenue Code. Instead, it adopted a *modified version* thereof. And with that modification, just as plainly as an elephant that the Commissioner would have us pretend like we cannot see, the Legislature ***did*** intend to restrict the relevant element of the support test to only certain fundraisers when it modified the definition of "support" to include:

> [g]ross receipts ***from fundraisers which include*** receipts from admissions, sales of merchandise, performance of services or furnishing of facilities in any activity which is not an unrelated trade or business within the meaning of Section 513 of the Internal Revenue Code of 1986, as amended . . . .[25]

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[23] For example, in *Hodge v. Ginsberg*, 172 W. Va. 17, 22, 303 S.E.2d 245, 250 (1983), this Court held:

> Contrary to the respondent's representations, the Social Services For Adults Act is clearly remedial legislation which should be construed to achieve its beneficial purposes. . . . [*Andy Bros.*]. The purpose of the Department of Welfare is to provide aid and encouragement to the "residents of the State who are subject to the recurring misfortunes of life . . . ." W. VA. CODE § 9-1-1. When the definition of "incapacitated adult" contained in W. VA. CODE § 9-6-1(4) is read in light of this legislative purpose, *it is evident that the Legislature intended a broader application of the statute than that given it by the respondent.*

(Emphasis supplied). Likewise, in the instant case, when one considers the likely intent of the Legislature in its modification of the subject statute in order to benefit the charitable purposes of community hospitals, this Court should reject the interpretation advanced by the Appellee.

[24] Appellee's Br. at 20 (emphasis omitted).

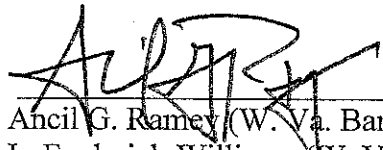
[25] W. VA. CODE § 11-15-9(a)(6)(F)(i) (emphasis added).

The Commissioner asks the Court to assume that the Legislature has ignored the basic rule, "If it ain't broke, don't fix it." In its brief, the Hospital has offered several reasons why the Legislature modified the federal statute to protect the financial soundness of non-profit organizations like the Hospital. Conspicuous by its absence, however, is the Commissioner's explanation of why, if the Legislature intended to impose the federal definition of support, it would not simply have done so, *i.e.*, simply have enacted the *unmodified* language of I.R.C. (26 U.S.C.) § 509(d)(2) into West Virginia law. The Legislature's refusal to do so requires the conclusion that it also did not intend to adopt the unmodified federal meaning of support into West Virginia law.

Accordingly, the Hospital respectfully requests the Court to reverse the judgment of the Circuit Court of Randolph County and remand this case to the Commissioner for an award of the Hospital's refund.

DAVIS MEMORIAL HOSPITAL

By Counsel



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CERTIFICATE OF SERVICE

I hereby certify that on May 12, 2008, I served the foregoing ***Reply of the Appellant*** on all counsel of record, by depositing a true copy thereof in the United States mail, postage prepaid, in an envelope addressed as follows:

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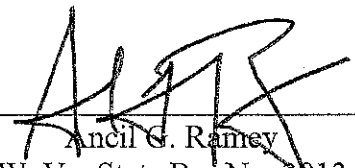

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